Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

In the Matter of	)	
	)	
Telefonica Larga Distancia	)	
de Puerto Rico	)	**WCB Docket No. 06-1**
	)	
Petition for Expedited Declaratory Ruling	)	
Regarding Section 253 of the	)	
Communications Act of 1934,	)	
as Amended	)	

Comments of San Juan Cable, LLC

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Summary

Telefonica Larga Distancia's petition should be granted and the Commission should rule that PRTC's single-zone tariff, if adopted, would violate Section 253(a) of the Communications Act.

Applicable federal and Puerto Rico law mandate the existence of a competitive intra-island telecommunications marketplace. PRTC's proposed tariff would obligate customers who purchase local exchange service to also purchase intra-island long distance service from PRTC. This would render intra-island long distance service provided by competitors superfluous, thereby materially diminishing or effectively eliminating intra-island long distance competition. PRTC would accomplish this, not by providing superior service or otherwise competing effectively. It would do so by tying the mandatory purchase of an otherwise competitively available service (long distance service) to the purchase of an otherwise unavailable monopoly service (local exchange service). In so doing, PRTC's tariff also seeks to raise rates for the vast majority of its customers (estimates are approximately 80%). In short, the tariff seeks to accomplish in a single stroke the'rare act of simultaneously eliminating intra-island competition while at the same time raising rates.

This is the rare case where the law is clear and unambiguous and is consistent with sound telecommunications policy.

The Telecommunications Act of 1996 preempted the statutory monopoly under which PRTC previously operated while parallel Puerto Rican legislation (Law 213)

established a central role for the Telecommunications Regulatory Board ("TRB") as the regulator of a competitive telecommunications marketplace in Puerto Rico. Puerto Rico is a unique and complex marketplace, and the TRB is well situated to craft rules carefully designed for the Puerto Rican marketplace. At the same time, in this case PRTC's single-zone tariff challenges the structure of the marketplace as a whole, and it does so in clear and blatant disregard for federal law. Thus, regrettably, PRTC has set in motion events which unavoidably call for the FCC to declare PRTC's proposed tariff unlawful. The tariff violates Section 253(a) of the Communications Act and the FCC should promptly issue a declaratory ruling affirming this simple and straightforward proposition.

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Comments of San Juan Cable, LLC

San Juan Cable, LLC d/b/a OneLink Communications ("SJC" or the "Company"), by its counsel, and pursuant to Public Notice,[1] hereby submits its initial comments in this proceeding.

I. Introduction and Summary of Position

SJC is a newly formed entity which purchased two cable systems in Puerto Rico in late October 2005 for approximately $520 Million. Those cable systems serve approximately 138,000 customers in San Juan and seven other communities, providing

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[1] Public Notice, D.A. 06-32 (rel. January 6, 2006).

both video and internet access services.[2] The Company does not currently provide voice communications services, but is evaluating the opportunities for doing so. The markets for cable television and high-speed internet access in Puerto Rico are highly competitive. The Company faces competition for its services from direct-to-home satellite providers, digital terrestrial television broadcasters, wireless and microwave service providers, PRTC, internet service providers, internet portals and the Puerto Rico Telephone Company ("PRTC").

The PRTC single-zone tariff filing which is the subject of this proceeding predated SJC's formation and ownership of its cable systems, and as such SJC has not participated in the parallel complaint proceedings which have been proceeding before the Telecommunications Regulatory Board of Puerto Rico ("TRB") since May 2005.[3] SJC is among those entities likely to be most directly affected by limitations placed on what has heretofore been an openly competitive intra-island telecommunications market. SJC has reviewed public documents in the complaint proceeding before the TRB, but has not

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2 Those other communities are Bayamon, Carolina, Catano, Guaynabo, Toa Alta, Toa Baja, and Trujillo Alto.

3 *Telefonica Larga Distancia de Puerto Rico et als. v. Puerto Rico Telephone Company*, Telecommunications Regulatory Board of Puerto Rico, Consolidated Case Nos. JRT-2005-Q-0121, JRT-2005-Q-0128, JRT-2003-Q-0297 and JRT-2004-Q-0068 ("PR Complaint Proceeding").

reviewed confidential filings in that case, and is not in possession of confidential information relating to the Complaint Proceeding.

SJC's position is, not surprisingly, that PRTC's tariff, if allowed to go into effect, would directly violate Section 253(a) of the Communications Act.[4] There is nothing complicated or ambiguous about SJC's argument. As a condition to purchasing PRTC's local exchange service, PRTC's tariff would require that customers also purchase intra-island long distance services, thus rendering competitive long distance service superfluous. PRTC's position is, apparently, that its single-zone tariff is roughly revenue neutral, that is, it will result in PRTC receiving roughly the same revenues as PRTC received before the change.[5] The only difference is that it will result in the elimination of intra-island long distance competition and, as a result, PRTC's intra-island *access charge* revenues will be substantially diminished.

The issues raised in this proceeding are not the same as are under discussion in the PR Complaint Proceeding. It is not about Puerto Rican law. It is not about the fine points of rebalancing historical Puerto Rican rate structures. It is not about how cost-based service should be defined under Puerto Rican law. This case is about whether or

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[4] 47 U.S.C. Section 253(a) ("Section 253").

[5] SJC is not currently qualified to, and therefore does not, take a position on whether the tariff filing would be revenue neutral, either immediately upon taking effect or at various times thereafter.

not the FCC will declare unlawful PRTC's efforts to chill investment for competitive telecommunications services in Puerto Rico by attempting to enact into state law a tariff provision that simply and unequivocally violates federal law.

There is an additional quality to the TRB case which provides further justification for the Commission's deliberation and action in this case. In the PR Complaint Proceeding, PRTC has sought to justify the tariff structure and the rates charged by reference to the costs that PRTC might incur if it were to deploy an all-new IP network in Puerto Rico, and to provide VOIP over that network.[6] As the Commission is aware, under the Commission's various orders, such IP services, if provided by PRTC, would be jurisdictionally interstate, and thus subject to federal law, not to Puerto Rican law. Thus, in presenting its case, PRTC has entangled federal and Puerto Rican law issues and has sought to avail itself of the benefits of federal law in justifying the tariff to the TRB. Having done this, little argument can be made that comity compels the FCC to avoid declaring whether or not PRTC's tariff, if adopted, would violate federal law.

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[6] *See* October 21, 2005 Testimony of Manuel E. Hernandez on behalf of PRTC. PRTC does not appear to be committing to investing in such a network; it appears only to have said that if it were to deploy such a theoretical network throughout Puerto Rico that the rates charged under the tariff could be justified by such investment. See also August 4, 2005 Testimony of David C. Blessing on behalf of PRTC ("Blessing Testimony").

For these reasons the FCC should move quickly and decisively to declare that PRTC's proposed tariff, if implemented, would violate Section 253(a) of the Communications Act.

II. PRTC's Tariff Filing, If Allowed to Go Into Effect, Would Clearly Violate Federal Law

A. PRTC's Single-Zone Tariff

The relevant portion of PRTC tariff filing is simple, consisting of two pages.[7] It provides that residential local exchange customers will be able to choose one of two plans. "Flat Rate Service" is priced at \$26.45 per month for *unlimited* local and intra-island long distance calls. "Measured Rate Service" is \$16.95 per month. It includes 100 minutes of local and intra-island long distance calls. Additional minutes of use (both local and long distance) are three cents per minute. Depending upon the type of local service to which they are currently subscribed, PRTC would automatically move all residential customers to one of these two plans. For business customers, local exchange service is \$39.95 per line, which includes 300 minutes of local and intra-island long distance calls. Additional minutes of use (both local and long distance) are three cents. Given the two residential options, it is estimated that most residential customers will purchase the unlimited local and intra-island long distance service plan. Those customers

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7 The tariff filing is Exhibit D to the Petition for Expedited Declaratory Ruling filed by Telefonica Larga Distancia de Puerto Rico in this proceeding.

will have no reason to obtain long distance service from a competitor. In addition, although not specified in the tariff, customers who subscribe to a plan containing an allotted number of minutes of use and who desire to use all of the minutes allotted under these new programs for both local and intra-island long distance service are technically precluded from presubscribing to another carrier's intra-island long distance services.

PRTC currently offers stand-alone local service that does not require customers to purchase long distance service from PRTC as a condition of purchasing local telephone service. PRTC also offers, and a number of local customers voluntarily subscribe to, PRTC's intra-island long distance service, however subscribing to long distance is not mandatory. Thus, in contrast to existing arrangements, where local customers would subscribe to PRTC for local service priced at local rates, PRTC's proposed tariff would require that customers desiring to purchase local exchange service also subscribe to *and pay for* long distance service.[8]

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[8] PRTC has advised the TRB in the PR Complaint Proceeding that its tariff filing is revenue neutral using January through March 2005 revenue calculations. *See* Blessing Testimony at 14. In April 2005 PRTC's per minute intrastate access charges were reduced from approximately 9 cents to approximately 2 cents. Putting aside all complexities associated with the notion of revenue neutrality (*e.g.*, the underlying assumptions under which such a conclusion can be true), in professing revenue neutrality, given the substantially lower access charges that now apply, PRTC implicitly acknowledges that its new "local" service revenue is in excess of the revenue PRTC would have received where customers had the option of purchasing local exchange service without long distance service. More generally, PRTC has also

(Cont'd on following page)

B. PRTC Has Market Power

PRTC's marketing strategy would not be so objectionable if PRTC did not have market power, but it does. It is the monopoly provider of local exchange service, and the dominant provider of intra-island and interstate long distance service. PRTC has acknowledged before this Commission that PRTC is the only incumbent local exchange carrier in Puerto Rico, and that the number of customers it serves "is likely very closely to total subscribership on the island."[9] "Based on the conditions in Puerto Rico, it is highly unlikely that more than a very small percentage of households subscribe to a wireline or wireless competitive carrier in place of [PRTC]. This is based upon the fact that the areas in which [PRTC's] subscribership levels are particularly low... are also areas in which competitors, wireline and wireless, lack facilities." *Id.* PRTC's "sole major facilities-based wireline competitor is focused on the business market and new

(Cont'd from preceding page)

argued to the TRB that the single zone pricing with mandatory purchase of long distance is necessary because "PRTC must be allowed to adjust its rates to meet the competition or it will be faced with severe erosion of revenues which could threaten its continued economic viability." August 4, 2005 Direct Testimony of Robert W. Crandall, at 5 ("Crandall Testimony"). While true, in this instance PRTC has not sought to innovate, but to "adjust" its rates in a manner that artificially forecloses competition for intra-island long distance service. In other words, PRTC is doing precisely what is alleges it should not do: "abuse [the] remaining market power that PRTC derives from its incumbent position by engaging in predatory pricing." *See* Crandall Testimony at 6.

9 Letter from Nancy J. Victory to Jeffrey Carlisle, Chief of the Wireline Competition Bureau, at 1, CC Docket 96-45 (March 29, 2005).

commercial and residential development. Likewise, wireless competitors, including [PRTC's] affiliated wireless provider, have the same difficulties as [PRTC] does serving remote areas…." *Id* at 1-2. In short, by its own admission PRTC is a monopoly provider of local exchange services in Puerto Rico.

It is thus PRTC's status as a monopoly provider of local exchange services that renders unlawful PRTC's efforts to require customers who desire local exchange service to also purchase long distance service.

C. PRTC's Tariff Violates Section 253(a)

Section 253(a) provides that no "State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[10] Section 253(d) provides that if after notice and comment, the Commission determines that a state or local government "has permitted or imposed any statute, regulation or legal requirement that violates [Section 253(a), that] the Commission *shall preempt* the enforcement of such statute, regulation or legal requirement to the extent necessary to correct such violation or inconsistency." Emphasis supplied.

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[10] "Legal requirement" is to be interpreted broadly in order to avoid escaping preemption based solely on the way in which the action is structured. *In re Minnesota*, 14 FCC 21697, 21707 (1999).

The TRB is considering permitting PRTC's tariff filing to go into effect. Permitting it to go into effect would be an action by a State.[11] Thus the legal question is whether the tariff would "prohibit or have the effect of prohibiting the ability" of other carriers to provide intra-island long distance service. The answer to this is squarely yes. It is well established that where a state or local requirement "shield[s] the local LEC from competition by other LECs, the requirements are not competitive neutral...." [12] The test for whether an incumbent LEC is shielded is whether the action "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced" marketplace.[13] As a potential competitor to PRTC, a material consideration concerning whether or under what conditions SJC would enter the voice communications market in Puerto Rico is whether or not PRTC has structured its local service offering in such a manner as to effectively prohibit Puerto Rican customers from purchasing intra-island long distance service from SJC.

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11 The term "State" includes Puerto Rico. *See* 47 U.S.C. § 153(40).

12 *AVR, L.P. d/b/a Hyperion of Tennessee, LP, Petition for Preemption of Tennessee Code Annotated § 65-4-201(d) and Tennessee Regulatory Decision Denying Hyperion's Application Requesting Authority to provide Service in Tennessee Rural LEC Service Areas,* CC Docket No. 98-92, Memorandum Opinion and Order (rel. May 27, 1999) at ¶12 ("*Hyperion*").

13 In *Re Pittencrieff Communications, Inc.* 13 FCC Rcd 1735, 1751 (1997).

The Commission has repeatedly and without deviation recognized the proposition that state action which limits the ability of a competitor to compete in a "fair and balanced" marketplace is unlawful under Section 253(a). In the *Hyperion,*[14] *Silver Star,*[15] and *Classic Telephone*[16] cases the Commission has held that where state or local regulations contemplated providing a meaningful marketplace advantage to an incumbent local exchange carrier, *even for what a reasonable person might consider valid economic or policy reasons*, is simply unlawful after the adoption of Section 253(a) in 1996.[17]

Thus, the Commission has held that competitively neutral cost recovery mechanisms "must not give one service provider an appreciable, incremental cost advantage over another service provider when competing for a specific subscriber."[18] Also, "[c]ompetitive neutrality would require that separations rules not favor one

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14 *Hyperion* at ¶¶ 12-23.

15 *In re Silver Star Tel. Co.*, 12 FCC Rcd 15639, 15656 (1997).

16 *In re Classic Tel., Inc.,* 11 FCC Rcd 13082, 13095-97 (1996).

17 *See also, In re Pub'l Util. Comm'n of Texas,* 13 FCC Rcd 3460, 3480-3485 (1997), citing particularly, certain Supreme Court precedent for the proposition that state-related activity is preemptable when the state-related activity "stands as an obstacle" to the fulfillment of the goals of federal law (citing, among others, *Gade v. National Solid Waste Mgt. Ass'n*, 505 U.S. 510, 525-526 (1977)).

18 *Telephone Number Portability*, Third Report and Order, FCC 98-92, CC Docket No. 96-116, ¶ 53 (rel. May 12, 1998).

telecommunications provider over another or one class of providers over another."[19] In this case, the issue is not whether PRTC will have a *cost advantage*, but whether, as a condition of receiving local exchange service customers would be precluded from presubscribing to SJC for intra-island long distance service, a heretofore competitive service. Such an arrangement would clearly "favor" one carrier over another. To the extent that universal concerns are a background factor in this case,[20] or there is any concern about universal service in this case, it should be noted that the Commission has clearly held that it rejects outright any "assumption that competition and universal service are at cross-purposes, and that in rural areas the former must be curtailed to promote the latter."[21]

To be sure, a "competitively neutral" action need not treat all carriers equally. Commission has recognized this in a number of contexts and has, for example: "'non-discriminatory and competitively neutral treatment' does not necessarily mean 'equal'

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19 *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, Notice of Proposed Rulemaking, 12 FC Rcd 22120, 22132 at ¶ 24 (1997).

20 Such concerns might arise as a result of the fact that in Docket 96-45 the Commission has recently issued a notice of proposed rulemaking with regard to a petition by PRTC requesting additional universal service funding. *See* Federal Register, January 11, 2006 at p. 1722.

21 *Hyperion* at ¶ 20.

treatment. For instance, it could be non-discriminatory and competitively neutral regulation for a state or local authority to impose higher insurance requirements based on the number of street cuts an entity planned to make, even though such regulation would not treat all entities 'equally.'"[22] In this case however, there is nothing about PRTC's proposed tariff that could even conceivably be considered "competitively neutral." In short, PRTC's proposed tariff seeks to force customers to purchase a service they may not want (intra-island long distance) in order to obtain a service they do want (local exchange service). This is an impermissible tying arrangement which, for the reasons discussed above, clearly violates Section 253(a).

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22 *Implementation of Section 302 of the Telecommunications Act of 1996 (Open Video Systems),* Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227, 20310 at ¶ 195 (1996).

III. An Emergency Declaration is Necessary and Appropriate In This Case

As PRTC's tariff is not yet in effect, and because the tariff is subject to a complaint proceeding before the TRB that challenges the legality of the tariff, a question arises as to whether in this proceeding the FCC should issue a declaratory ruling or await a final decision from the TRB before declaring the tariff unlawful. SJC believes that there are several reasons why an emergency declaration by the Commission that PRTC's tariff violates Section 253(a) is necessary and appropriate at this time.

First, it is unclear when or under what conditions PRTC could cause its tariff to go into effect, and it appears that PRTC may have the legal ability to unilaterally declare its tariff effective. If it were to do so, the Commission should have a developed record in place which provides it the lawful ability to quickly rule on whether or not the tariff is preempted under Section 253.

It appears from the filings in this proceeding that under Section 7(a) of Puerto Rico Law 213 that PRTC need only submit changes to its prices and charges to the TRB "simultaneously when implemented in the market," and that the TRB has declined to order PRTC to not unilaterally implement the tariff.[23] Thus under Puerto Rico law presumably PRTC could force the tariff to go into effect at any time and without any

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[23] *See* January 19, 2006 Letter to Marlene H. Dorch from Brett Snyder, counsel to Telefonica Larga Distancia de Puerto Rico in this proceeding.

further action by a government agency. If this were to occur, and TRB were not to intervene, presuming that SJC is correct that the tariff violates federal law, the FCC would be obligated to step in and preempt the tariff under Section 253. Section 253(d) requires that the Commission undertake notice and comment before determining that an action occurring at a state (or in this case, Puerto Rico), be preempted. Thus, there is ample reason for the Commission to develop a record in this proceeding without delay.

<u>Second</u>, it is appropriate for the FCC to issue a ruling declaring PRTC's proposed tariff unlawful because it would provide the parties and TRB with guidance about how the FCC would likely act in the event that PRTC were to force the tariff into effect. Such a declaration would serve the additional benefit of avoiding preempting the TRB. The complaint proceeding before the TRB involves a great number of cost and non-cost issues. The TRB is uniquely situated to investigate and resolve those issues, and its jurisdiction must be respected. Based upon its admittedly incomplete review of the lengthy docket in the Complaint Proceeding, it appears to SJC that declaring the specific tariff filing proposed by PRTC violative of federal law would not necessarily make moot the investigation into the cost and market structure issues raised to date in the Complaint Proceeding. Therefore, it would be well within the TRB's discretion to determine that it is in the public interest to continue to investigate the cost and structure issues raised in the Complaint Proceeding. Whether the TRB would do so, or to what end, is a matter for the TRB's discretion.

Third, PRTC's actions have now raised the important federal question of whether an incumbent LEC can lawfully mandate the bundling of local and intrastate long distance service and, in so doing, diminish markets that were heretofore competitively neutral. This issue resonates in 50 states, not just in Puerto Rico. Therefore, if, as SJC believes, mandatory bundling of local and long distance service by incumbent LECs is a clear violation of federal law, it is incumbent upon the Commission to so state.

Conclusion

For the foregoing reasons the Commission should promptly declare that PRTC's proposed tariff, if implemented, would violate Section 253(a) of the Communications Act.

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CERTIFICATE OF SERVICE

I hereby certify that I have on the 26th day of January 2006, served a copy of the foregoing on the following persons by first-class mail, unless otherwise noted:

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